No. 12513

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

O. E. HAMBLETON and HARRIET ELIZABETH HAMBLETON, his wife,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

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STATEMENT OF THE CASE

Before answering the arguments of the appellees as set out in their brief, it is believed that it will be of assistance to the Court to analyze the facts and evidence in this case.

In the appellant's original brief we reviewed the testimony which was most favorable to the appellees without any particular analysis of the evidence which gave rise to the summary statement of the case. The analysis of the transcript of the testimony of Mrs. Hambleton and her mother, Mrs. Raskin, does not support the allegations of the complaint, nor the statements of fact upon which the appellees rely. The evidence, likewise, does not sustain the trial judge's findings of fact.

It is alleged in the complaint in Paragraph III (T. R. 6) that Mr. Anderson grilled Mrs. Hambleton "on matters concerning which she had no knowledge and with which she had no connection." The only evidence presented on this subject is found starting on Page 56 of the Transcript of Record where Mrs. Hambleton states, "He kept asking me over and over if I knew Lt. Bennett, and I kept telling him no, and he kept asking me again, until finally we decided the party he was talking about had a different name that I knew him by." The testimony of Mrs. Hambleton, which goes on from that point through Pages 57 and 58 of the transcript, clearly indicates that it was necessary for Mr. Anderson to continue to interrogate Mrs. Hambleton in order to determine that she actually did know Lt. Bennett, but that she knew

him under the alias of Crowther. It is plain that Mrs. Hambleton did have knowledge of Lt. Bennett and did tell Mr. Anderson she was familiar with his business. This evidence clearly negatives the allegation of the complaint as above stated since Mrs. Hambleton did have knowledge of the matters about which Mr. Anderson was making his investigation. The complaint alleges that Mr. Anderson "grilled" Mrs. Hambleton and the Court made a finding of fact to that effect. The only evidence of "grilling" is Mrs. Hambleton's statement to the effect that Mr. Anderson asked the same questions over and over again. However, as heretofore pointed out, the repetitive questions were necessary to obtain from Mrs. Hambleton the information which she had in her possession but was withholding, either intentionally or inadvertently, from Mr. Anderson. It should also be pointed out to the Court that Mrs. Hambleton was willing to carry on the conversation (T.R. 57, 58). The appellant contends that in the absence of any threats of force, violence, or arrest, that this does not sustain any finding of fact that Mr. Anderson "grilled" Mrs. Hambleton.

Much stress is laid on the conclusion stated by Mrs. Hambleton that Mr. Anderson insulted her by insinuating that her ulcers were caused by excessive

drinking. This insinuation is not borne out by the evidence. Mrs. Hambleton's testimony concerning the ulcers and drinking is found on Page 46 of the Transcript of Record wherein Mrs. Hambleton sets out the conversation which led to her conclusion. All Mr. Anderson stated was, "Well, you know what I take," referring to his own ulcers. From this statement, Mrs. Hambleton jumped to the conclusion that Mr. Anderson was accusing her of being a drunkard and that her ulcers were caused from such debauchery. It is obvious from this unwarranted assumption and conclusion stated by Mrs. Hambleton that she was so obsessed with the evils of drinking, from having lived with a drunkard for sixteen years (T. R. 62), she immediately thought Mr. Anderson was speaking of excessive drinking as the cause of her ulcers. In her testimony on Page 46, Mrs. Hambleton started a sentence with the words, "This ulcer was caused—" but then changed to another subject and did not finish the sentence. Undoubtedly, Mrs. Hambleton was about to tell the Court that her ulcers were actually caused by the nervous anxiety of living with a drunkard for sixteen years but caught herself just in time.

There is another allegation in the complaint to the effect that Mr. Anderson accused Mr. Hambleton

of consorting with a redheaded woman. Presumably, the Court was referring to this allegation in the findings of fact wherein the Court referred to "statements on delicate, personal subjects, not directly connected with the investigation." A careful examination of the testimony of Mrs. Raskin shows that Mr. Anderson did not say "redheaded woman" but asked if Mr. Hambleton had left Seattle with a redhead. Mrs. Raskin testified that Mr. Anderson insinuated that Mr. Hambleton had left with a redhead and that she naturally thought it was a woman. Although Mr. Anderson did not actually say it was a redheaded woman, she was certain it was a redheaded woman. It was undoubtedly natural for both Mrs. Hambleton and Mrs. Raskin to jump to this conclusion in the light of their knowledge of Mr. Hambleton's conduct (T.R. 83).

Further, the testimony of Mrs. Hambleton and Mrs. Raskin is erratic and inconsistent. First Mrs. Hambleton, and then her mother, admitted that it was news to Mr. Anderson when they told him that Mr. Hambleton was in Nevada and that he had been in an accident. However, they chose to say that they believed he knew enough about the trip to insinuate that Mr. Hambleton was with a redheaded woman and that he was being held on criminal charges in

Nevada. The following is quoted from Mrs. Hambleton's testimony on Page 42 of the Transcript of the Record:

> "Q: Did he explain how your husband got to Nevada?
>
> A: No, he didn't. He didn't know about my husband being gone at first. I think he was more or less trying to find out where my husband was when he came in, and then he asked me if I knew where he was, and I said, 'Yes, I know where he is' and he wanted me to tell him, and I said, 'I have to be careful who I tell where my husband is because of the type of business he is in'."

The summary of Mrs. Rankin's testimony on Page 83 was worded as follows:

> "When Mr. Anderson discovered that Mr. Hambleton had been in an accident * * *."

If, by their own testimony, Mrs. Hambleton and Mrs. Raskin believed Mr. Anderson knew nothing of the whereabouts of Mr. Hambleton, or of his accident, it is difficult to see how Mrs. Hambleton jumped to the conclusion that he was giving her information that her husband was being held on grand larceny charges. Mrs. Raskin gave no testimony that she had heard Mr. Anderson say Mr. Hambleton was being held on grand larceny charges.

The testimony of Mrs. Raskin throws further light upon the unwarranted assumptions which both

Mrs. Hambleton and Mrs. Raskin made as to what Mr. Anderson was insinuating. According to Mrs. Raskin's testimony she drew the conclusion that Mr. Anderson was insinuating Mrs. Hambleton was trying to get a divorce when Mr. Anderson asked Mrs. Hambleton if she had an attorney (T.R. 84). If Mr. Anderson did ask this question, it was a natural question to ask a woman whose husband had been in an accident in another state. Again, the conclusion that Mr. Anderson was advocating a divorce when he mentioned the word "attorney," was a natural result of the witnesses' knowledge of Mr. Hambleton's conduct since Mrs. Hambleton admits she had grounds for divorce many times but did not go through with it (T.R. 66). The word association of both women reveals the story of Mrs. Hambleton's married life and the unquestionable cause of her ulcers and mental breakdown:

Ulcers .....Drink
Redhead .....Woman
Attorney .....Divorce

This is the testimony upon which the trial Judge based the finding of fact that Mr. Anderson subjected Mrs. Hambleton to "repetitive questions on delicate, personal subjects, not directly connected with the subject he was investigating." It is admitted that the testimony was confusing, and probably purpose-

fully made confusing to the Judge, but there is not one word in the transcript to support the trial Judge's finding of fact in this case.

In addition to the unwarranted assumptions and conclusions which the witnesses drew from Mr. Anderson's statements, there is another fact which had a very important bearing upon the validity of the testimony of the appellees' witnesses. The original complaint which is on file with the clerk of this Court and set out in the appendix herein, was sworn to by Mr. Hambleton on April 30, 1948, about two months after Mrs. Hambleton was discharged from the hospital. Mr. Hambleton was not present at the time of Mr. Anderson's interview with Mrs. Hambleton which is the subject of this lawsuit. Mrs. Hambleton testified that when she came out of the hospital she could not remember the details of the interview with Mr. Anderson about which she testified (T.R. 60) and, further, admits that she did not remember any of the details of the interview until after the matter was called to her attention by her neighbors. These questions by the neighbors did not take place until after the F.B.I. was investigating the case (T.R. 61). Since there was no case to investigate prior to April 30, 1948, it is obvious that Mr. Hambleton did not obtain the information for his allegations from Mrs.

Hambleton but from the conclusions Mrs. Raskin drew from the conversation between Mrs. Hambleton and Mr. Anderson which she overheard. It is obvious from reading Mrs. Raskin's testimony (Tr. 83 to 87) that Mr. Anderson did not say that Mr. Hambleton had left with a redheaded woman, that Mr. Anderson did not advocate a divorce, and that Mr. Anderson made no statements about Mr. Hambleton's being held on charges of grand larceny and drunken driving. In fact, Mrs. Raskin testified (T.R. 84) that "after Mr. Anderson left, Mrs. Raskin figured that he had been trying to get the name of a man and if he had left town with Mr. Hambleton, and in regard to something that had happened at Fort Lawton."

In the complaint and in the Court's findings of fact there are further statements to the effect that Mr. Anderson's conduct caused Mrs. Hambleton physical and mental injury. The evidence does not support any finding that Mrs. Hambleton sustained any physical injury of any nature during the course of the interview. Undoubtedly, the appellees rely upon the testimony to the effect that Mrs. Hambleton took some medicine while Mr. Anderson was present to sustain the finding of physical injury. A careful analysis of the testimony shows that Dr. Flaherty prescribed some medicine for Mrs. Hambleton to take daily dur-

ing her convalescent period (T.R. 34). On Page 84 of the transcript Mrs. Raskin states that she asked Mrs. Hambleton if she did not want some of her medicine and that Mrs. Raskin obtained some of the medicine for her. On Pages 63 and 64, counsel for the appellees sought to have Mrs. Hambleton testify that the questioning by Mr. Anderson caused her physical injury. Even with leading questions and by putting answers in the mouth of the witness, the counsel was unable to make the witness testify to such a fact. Mrs. Hambleton only stated that she just took the medicine because Dr. Flaherty had prescribed it.

From this testimony it is obvious that there was no physical injury inflicted upon Mrs. Hambleton. She was already upset and nervous on the 19th of January and Dr. Flaherty had prescribed medicine for her to be taken at regular intervals. Certainly, no logical inference can be drawn in that testimony relative to Mrs. Hambleton taking her medicine which would support any finding that there was any physical injury.

In analyzing the testimony there is another example of Mrs. Hambleton drawing an unwarranted inference from what actually happened. On pages 54 and 55 of the transcript the testimony is recorded

as to what actually occurred which gave rise to Mrs. Hambleton's conclusion that she was being "grilled".

One of the questions asked and the answer given is as follows:

> "Q. Did he do anything that would lead you to believe that he would use force or had the means of using any force to obtain any information from you?
>
> A. Well, I can answer that yes, for the simple reason he knew so much about our business that I was afraid he would bring pressure through what he knew of our files, because they were in strict confidence, and when I figured that he knew what was in those files that were supposed to be confidential, I figured that he would use those over us for information. I figured that a Government man could do that if it became necessary to get information from someone."

The conclusion drawn by Mrs. Hambleton that a Government man could use Mr. Hambleton's files to force information from Mrs. Hambleton is entirely a matter of wild speculation, not based on any statements made by Anderson. This is but one example of Mrs. Hambleton's unlimited imagination from which she has drawn the unwarranted conclusions that she was being "grilled", that Anderson was advocating a divorce, that Anderson was insulting, and that he was accusing Mr. Hambleton of consorting with a redheaded woman.

REPLY TO APPELLEES' ARGUMENT ON SPECIFICATIONS OF ERROR 1 AND 2

In Specifications of Error 1 and 2 the appellant contends that the trial Judge erred in overruling the appellant's motion to dismiss the appellees' complaint and also the Court erred in finding from the evidence that a tort was committed for which relief would be granted under the laws of the State of Washington.

In answer to the appellant's argument on these specifications of error, the appellees first seek to convince the court that there was a physical injury "not caused by words alone." The appellees seek to prove that insanity resulting from an emotional and mental disturbance is a physical injury. Even if this play on words had some foundation in fact and even if Mr. Anderson's actions were the cause of the mental illness, Mrs. Hambleton's trouble arose from the use of words alone. There is not one iota of proof of any invasion of her person or property. In the appellees' brief it is argued that extended interrogation and excessive grilling and emotionally disturbing methods, which were unreasonable and imprudent, caused the injury. As previously shown, an examination of the testimony reveals that Mrs. Hambleton was not placed in any fear of arrest, force, or violence and that she was willing to carry on the conversa-

tion with Mr. Anderson and, further, that Mr. Anderson was never asked to leave the premises.

The appellees seek to distinguish insanity from mental anguish, admitting that mental anguish is not subject to positive proof. The testimony of the neuropsychiatrist, Dr. Riley, clearly shows that a psychosis develops from mental anguish. Therefore, if mental anguish is not subject to positive proof, how then can the appellees contend that insanity is subject to positive proof?

The appellees state that no case has been cited by the appellant where the Supreme Court of the State of Washington has held that no recovery can be allowed when the plaintiff has suffered a real injury even though the cause thereof did not involve an invasion of the plaintiff's person or property. In this regard the appellees overlooked the case of *Barnes v. Bickle*, 111 Wash. 133. In that case the acts of the defendant retarded the plaintiff's recovery from an operation. There was before the Court a real physical injury, aside from the mental anguish, yet no recovery was allowed because of the lack of an invasion of the plaintiff's person or property.

The appellees next seek comfort in a quotation from the restatement of torts quoted on Pages 12 and 13 of the appellees' brief. The quotation from the

restatement, which states that recovery will be allowed for intentional or unreasonable emotional distress, is limited to cases in which the actor "should recognize" that his acts are likely to result in illness or other bodily harm. As Dr. Riley, witness for the appellees, stated in his testimony, only an expert trained in neuropsychiatry would be able to determine whether questioning of an individual would precipitate a psychosis (T.R. 71 and 72). It is, therefore, clear from the proof in this case that Mr. Anderson had no way of recognizing whether his acts would result in illness or other bodily harm to Mrs. Hambleton. The Restatement of the Law of Torts is not the law of Washington in any event.

The appellees next cite the case of *Emden v. Vitz*, 198 Pac. (2d), 696 (88 Cal. App. (2d) 313). The law as stated in the decision in that case is not the law of the State of Washington. It is the law of the State of California. The Federal Tort Claims Act, as originally enacted, Section 931, Title 28, U.S.C., and as revised, Section 1346, Title 28, U.S.C., renders the Government liable only in those cases where a private person would be liable in accordance with the law where the act or omission occurred. Therefore, the law of the State of California is of no avail to the appellees when the act occurred in the

State of Washington. It should be further pointed out that according to the facts in the Emden case, the defendant "leaned against the door so the plaintiff could not leave." This was false imprisonment and as such an assault which, of course, is an invasion of the plaintiff's person. The following is quoted from 6 C.J.S. 802:

> "*False imprisonment* always includes a technical assault, and generally a battery; but if there is no touching of the prisoner it is not a battery."

Although in the decision in the Emden case, supra, the California Court allowed recovery. The decision states:

> "In respect to the right to recover damages for personal injuries resulting from an emotional or mental disturbance, it has been said that 'the authorities are in a state of dissension probably unequalled in the law of torts'." * * *

and further on in the opinion it is stated:

> "It may be conceded that the foregoing propositions, although firmly based upon well-recognized principles of tort law, have not met with universal application, for a definite cleavage of opinion exists among the authorities from the various jurisdictions as to whether an action for personal injuries resulting solely from fright or other mental distress may be maintained in the absence of some contemporaneous impact or injury to the plaintiff, however slight it might be." See cases collected in Hallen, Damages for Physical Injuries Resulting From Fright or Shock,

(1933) 19 Va. L. Rev. 253; 98 A.L.R. 402; 76 A.L.R. 682; 40 A.L.R. 983; 11 A.L.R. 1120.

As will be noted in 23 A.L.R. 361, the State of Washington is one of the leading states holding that no recovery for mental shock and pain will be allowed in the absence of some impact.

The appellees seek to use the case of *Gadbury v. Bleitz*, 133 Wash. 134, as authority for the trial Judge's holding that a tort was committed. The Gadbury case involved an undertaker threatening to hold the body of the plaintiff's son until an old bill was paid. Although the court allowed recovery for emotional and mental distress, such recovery was allowed, first, because the act of the defendant was a misdemeanor as defined by the statutes of the State of Washington and, second, because it was an invasion of the plaintiff's right to have her son given a proper burial. The following quotations are from the decision in the Gadbury case:

> "In this connection it might be well to notice that the legislature has seen fit to make the detention of the dead body of a human being punishable as a misdemeanor. * * * * * * * * it has been held in many cases that those persons who by relationship have a peculiar interest in seeing that the last sad rites are properly given the deceased may maintain the action. In *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40, 68

L.R.A. 956, this question is completely answered as follows:

> 'There is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation, and that a willful or wrongful invasion of that right is one of those torts for which damages for injury to feelings are recoverable as an independent element'."

It should be further noted that the Supreme Court of the State of Washington has limited recovery for mental shock and pain to cases involving improper burials, as stated in the case of *Corcoran v. Postal Telegraph-Cable Company*, 80 Wash. 570.

> "In *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172, the plaintiffs were allowed damages for mental suffering unaccompanied by physical injury, flowing from the wrongful and improper burial of their infant child by the defendant. *This decision we regard as the extreme proper application of the rules of law allowing damages for mental suffering alone, and we are constrained not to extend the doctrine beyond the application of the particular facts there involved.* The acts were regarded by the court as willful, and the wrong consisted in the violation of the rights of the parents to have decent interment for their infant child. It was also a physical invasion of the plaintiff's rights." (Italics ours.)

The appellees next cite *Clark v. Washington Retail Creditmen*, C.C.A. (D.C.) 105 Fed. (2d) 62. That

case arose in the District of Columbia and as such is not the law of the State of Washington. Judge Vinson wrote a dissenting opinion which is more in conformity with the law of the State of Washington.

The appellees next seek to represent to this Court that the conduct of Mr. Anderson was willful and wanton. In this regard, there is not one word of evidence which would indicate that Mr. Anderson knew or had any knowledge of Mrs. Hambleton prior to the interview, nor is there any evidence which would in any way indicate that he had any malice or ill feeling toward Mrs. Hambleton. Further, it should be pointed out here that although the complaint alleges intentional acts, the trial Judge did not find that the acts were intentional, nor that Mr. Anderson was willful and wanton. Further, it is difficult to understand how Mr. Anderson could intentionally or willfully precipitate psychosis when, as the neurosychiatrist testified, only an expert could tell what might, or might not, precipitate a psychosis.

The appellees next seek to rely upon an actual physical illness resulting directly from Mr. Anderson's conduct. As has been previously shown in this brief, Mrs. Hambleton was so emotionally upset upon visiting Dr. Flaherty on December 31, 1947 and January 19, 1948, that the doctor had to prescribe medi-

cine to calm her nerves. Mrs. Hambleton took this medicine during the course of the interview solely because the doctor had prescribed it and not because of anything Mr. Anderson had done.

REPLY TO APPELLEES' ARGUMENT ON SPECIFICATION OF ERROR No. 3

Specification of Error No. 3 is directed to the lack of evidence upon which the trial Court could find that the proximate cause of psychosis were the acts of Mr. Anderson. Here again, the appellees seek to rely upon intentional acts. Again the Court is reminded that there is no finding of fact that Mr. Anderson's acts were intentional as regards causing any emotional distress to Mrs. Hambleton.

The appellees state in their brief on Page 18, "We are not concerned with his negligent or careless inadvertent acts." The appellees fail to take into account the trial Court's finding of fact wherein only negligence is mentioned. Despite the testimony of the appellees' own witness, Dr. Riley, that only an expert could tell what would precipitate a psychosis, the appellees seek to convince this Court that Mr. Anderson should have recognized that his acts were likely to precipitate a psychosis. It is the appellant's contention that this argument has no foundation.

If the appellees' theories were actually the law, then every Government investigator would first have to have a prospective witness examined by a neuro-psychiatrist before asking any questions, otherwise, the investigator would subject the Government to possible liability in a suit such as this. The net result would then disqualify all emotionally unstable persons as witnesses.

The appellees lay much stress on the statements to the effect that Mr. Anderson persisted in the interrogation. In this regard it must be remembered that Mrs. Hambleton was perfectly willing to carry on the conversation and was in turn questioning Mr. Anderson on subjects about which she was seeking information.

The appellees state that there was no other factor which could have caused the psychosis. It must be remembered that insulin and electroshock treatments are for the purpose of making the patient forget the emotional disturbances which caused the psychosis (T.R. 69, 70, 97, 98). Admittedly, Mrs. Hambleton had been living with a drunkard for sixteen years and she had on many occasions considered divorce. For approximately three weeks at least, prior to Mr. Anderson's interview, she had been emotionally upset. (Dr. Flaherty's testimony).

It is the appellant's contention that the causal connection between Mr. Anderson's interview and the subsequent psychosis has not been established. On the contrary, the evidence shows clearly that Mrs. Hambleton did not, after her insulin and electroshock treatments, consider her husband's conduct as disturbing to her, which fact clearly shows that this was in fact the factor which caused her mental breakdown, and not Anderson's conduct.

On Page 80 of the transcript Dr. Riley states that Mr. Hambleton's drinking could have caused Mrs. Hambleton's mental collapse if it were a severe enough strain on Mrs. Hambleton. Mrs. Hambleton certainly furnished ample proof of the severity of the strain when she testified that Mr. Hambleton had been a drunkard for 16 years and that she could have sued him for divorce many times. (T.R. 62, 66).

REPLY TO APPELLEES' ARGUMENT ON SPECIFICATION OF ERROR No. 4

Specification of Error No. 4 is directed to the trial Judge's failure to dismiss the appellees' action for the reason that the same falls within the exceptions to the Tort Claims Act.

The discretionary function which Anderson was exercising as criminal investigator for the Depart-

ment of the Army is one for which Anderson himself would not have been liable under either the laws of the State of Washington or those of the United States. The Congressional reports dealing with the historical background of the Tort Claims Act throw light on the intent of Congress in excepting discretionary functions from the operation of the Act. Senate Report No. 1400 of the 79th Congress, Second Session, states in part on page 33 as follows:

> "Section 421. *Exceptions.*
>
> This section specifies types of claim which would not be covered by the title. They include claims based upon the performance or nonperformance of discretionary functions or duties; claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation; and claims which relate to certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available. * * *."

The appellees in their brief have italicized a quotation in *Kendrick v. U. S.*, 82 Fed. Supp. 430, which purports to limit the exercise of discretionary functions to executive officers. Sub-paragraph A of Section 2680, Title 28 U.S., the paragraph exempting discretionary functions from the operation of the Act, uses the word *employee* of the Government. An

employee is not necessarily an executive and has been recognized as such by the Courts.

In *Cooper v. O'Connor*, 99 Fed. (2d) 135, an agent of the Federal Bureau of Investigation, who was charged with duties identical to those of Mr. Anderson, was held not to be liable for discretionary acts he performed in the course of his duty in making investigations for the Department of Justice. The Court in that case set out specifically that while there have been many contentions that the discretionary exception should apply only to executive officers and heads of the departments, that the contention was not well taken, Paragraph 17, Page 142:

> "On the other hand, to hold that only the heads of departments should be immune from liability under the rule would defeat its purpose. We know that heads of the Federal Departments do not themselves engage in such activities as are here involved. Their administrative duties make such participation impossible. There must be, necessarily, delegation of authority for such purposes. When the act done occurs in the course of official duty of the person duly appointed and required to act, it is the official action of the department; and the same reason for immunity applies as if it had been performed by the superior officer himself. *De Arnaud v. Ainsworth*, supra, at pages 177, 181; *United States to Use of Parravicino v. Brunswick*, supra,. To hold otherwise would disrupt the government's work in every department. 'Its head can intelligently act only through subordinates.' *Farr v. Valen-*

> *tine*, 38 App. D.C. 413, 420, Ann, Cas. 1913C, 821. The fact that our country has grown so great as to require a multiplication of governmental officials in some small measure proportionate thereto, cannot obscure the fact that the duties performed are the same as those once performed by heads of departments, and that fearless performance of official duty is as essential today as it was yesterday.
>
> Therefore, we conclude that as the acts of appellees were performed in the discharge of their official duties, the motives with which those duties were performed are immaterial, and appellant's contention must fail."

The *Cooper v. O'Connor* case, above cited, restates the immunity of individuals in Government employ for civil liability for acts performed in the scope of their duties. It is stipulated in this case that Anderson was acting within the scope of his authority when he called at the Hambleton home to make his investigation. Under the Tort Claims Act the United States stands in the position of Anderson as far as liability for his acts is concerned. As a corollary to this, the United States has all the defenses of Anderson to this action. The United States could not be held to a higher degree of liability than Anderson could be. Anderson was an investigator for the Department of the Army. The United States can therefore avail itself of any defense Anderson might have in such a capacity.

Cooper v. O'Connor, cited above, and all of the cases which have followed, are authority for the fact that an investigator for the Government is not liable for acts done within the scope of his authority. In *Cooper v. O'Connor* the judge dismissed an action against Government employees as private individuals on the grounds stated above. Certiorari denied 305 U.S. 643; Rehearing denied 305 U.S. 673; Rehearing again denied 307 U.S. 651.

The Court takes particular notice in *Cooper v. O'Connor* that officers who investigate crimes and detect criminals are closely related to the judiciary which has always been excepted from civil liability for its official acts. The court again states on Page 140 as follows:

> "The administration of criminal justice would be impossible without the active participation of public officials representing the departments concerned with the enforcement of particular laws."

The Court goes on further to use *Spalding v. Vilas*, 161 U.S. 483, cited in appellant's original brief, for authority that even the presence of malice in the mind of the Government employee in carrying out his duty does not make him personally liable, and states as follows:

> "* * * It is now generally recognized that, as applied to some officers at least, even the absence

> of probable cause and the presence of malice or other bad motive are not sufficient to impose liability upon such an officer who acts within the general scope of his authority. * * *
> "Hence the officer is entitled to the protection which the law throws about him, not because the law is concerned with his personal immunity but because such immunity tends to insure zealous and fearless administration of the law."

The law of Washington on this subject as cited in appellant's original brief on Page 36 clearly shows that Anderson would not have been liable for the acts complained of in the State Court. See also *Anderson v. Manley*, 181 Wash. 327, 43 Pac. (2d) 39. Thus the "tort" here claimed would not be recognized as ground for liability under the Washington law or under the Federal cases.

It is difficult to see how the appellees find any comfort in their quotations from the Court's oral decision which is set out on Pages 22 and 23 of appellees' brief, to the effect that Anderson be held to the same degree of skill which a surgeon is assumed to possess. Clearly, Anderson had no knowledge of neuropsychiatry, and as such could not possibly have been possessed with the discretion of a neuropsychiatrist.

Further, in the same quotation from the Court's oral opinion there is a statement to the effect that Anderson's interrogation on delicate personal subjects was not related to the investigation which he

was conducting. If appellees seek to rely upon this finding of the trial Court the Government is clearly not liable. If Anderson was interrogating Mrs. Hambleton on matters outside of his official investigation then clearly he was not acting within the scope of his authority. Also, if it is contended by the appellees that Anderson was using some sort of implied threat or duress to force Mrs. Hambleton to give information, such conduct on the part of Anderson would clearly be in violation of the appellees' Constitutional rights. The Government has no authority to authorize an agent to violate appellees' Constitutional rights, therefore, if the appellees seek to follow such a theory they have argued themselves out of the jurisdiction of this court. As clearly stated in *Bell v. Hood*, 71 Fed. Supp. 813, on page 817:

> "But the Federal Government as sovereign has never consented to be sued for damages resulting from invasion of the rights protected by the Fourth and Fifth Amendments. To the contrary, since the commencement of this action, congress has expressly denied consent to sue the Federal Government upon 'any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process * * *' even in cases where such torts are committed by a federal officer 'while acting within the scope of his office or employment * * *.' Federal Tort Claims Act, 28 U.S.C.A. Sec. 921, 931, 943. * * * Whenever a federal officer or agent exceeds his authority, in so doing he no longer represents

the Government and hence loses the protection of sovereign immunity from suit."

REPLY TO APPELLEE'S ARGUMENT ON SPECIFICATION OF ERROR No. 5

Specification of Error No. 5 is directed to the trial judge's erroneous ruling that the wife of the private detective cannot be compelled to reveal the name of one of her husband's former clients.

The appellees argued in their brief that the appellant was seeking to indulge in hearsay testimony. A review of the record on Pages 52 and 53 clearly shows that all the appellant asked of the witness, Mrs. Hambleton, was, "Do you recall who that call was from?" In response to this question the witness volunteered that the lady who called was a former client of her husband, and that she had advised Mrs. Hambleton that she had told Anderson of Mrs. Hambleton's operation. The appellant again asked, "What is the lady's name?" The witness, Mrs. Hambleton, refused to answer, claiming privilege. It is clear that the appellant was not seeking to indulge in hearsay testimony from the questions asked. All the appellant sought to obtain from the witness was the name of the party who called.

It must be remembered that this was cross examination. On direct examination the appellees had

gone over everything that was supposed to have happened during the interview. If a telephone call was received by Mrs. Hambleton during the course of the interview it was proper for the appellant to determine on cross examination who the party was that called. Mrs. Hambleton seeking to bolster her case, as well as to supply some evidence to substantiate the allegation in the complaint to the effect that Anderson had been warned not to upset her volunteered the hearsay testimony. Obviously, appellant would have no knowledge of what the hostile witness would volunteer in answer to a question which called for a direct answer. The witness having volunteered such hearsay testimony little could be accomplished by way of asking that the Court strike the testimony. The testimony was very damaging to the appellant's case, and the appellant is entitled to the right to re-but that testimony. However, when the Court refused to compel the witness to state the name of the party calling it was impossible to offer rebuttal evidence. Likewise, in the absence of testimony from Mrs. Hambleton as to the name of the party who called, the testimony which the Government was prepared to present which would prove that portion of Anderson's report rendered to his superiors in January, 1948, as set out in paragraph 21 on Page 113 of the record, could not be presented.

Therefore, the Court's ruling that Mrs. Hambleton could not be compelled to reveal the name of one of her husband's former client's is reversible error. The subject matter was not a collateral point, but involved a very important and material matter. The cases cited in appellant's original brief clearly show that the Court's ruling was entirely in error. The appellant's right of cross-examination was virtually denied.

The appellant requests of this Court that a ruling be made on Specification of Error No. 5. The purpose for such request is that a similar question will undoubtedly be raised in some criminal case in which the Government would have no right of appeal. In the absence of a specific ruling by this Court on this question it is highly probable the trial Judge would follow the ruling of the trial Judge in this case. It is, therefore, of considerable importance to the Government that the question be settled in the Ninth Circuit as to whether the name of a private detective's client falls within some privilege rule.

CONCLUSION

The appellant having fully replied to the appellees' brief, and having shown to this Court that the trial Judge committed reversible errors in each of the five specifications set out in the appellant's original brief, it is respectfully requested that this Court enter an order reversing the lower Court and directing that an order be entered dismissing the appellees' action with prejudice.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

VAUGHN E. EVANS
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

APPENDIX I

No. 1984

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

O. E. HAMBLETON and
HARRIET ELIZABETH HAMBLETON,
his wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

For cause of action against the defendant, plaintiffs complain and allege as follows:

I

Plaintiffs are and at all times mentioned herein have been husband and wife, constituting a marital community under the laws of the State of Washington, residing in Seattle, Washington, in the territorial jurisdiction of the above-entitled court, to-wit, the Northern Division of the Western District of Washington. The acts herein complained of all occurred within said Division and District. Jurisdic-

tion of this action is conferred upon the above entitled court by U.S.C.A., Title 28, Section 931.

II

At all times mentioned herein William Anderson was a sergeant in the United States Army, acting as a CID agent, and under the jurisdiction of the Provost Marshal, Fort Lewis, Washington. All acts done, as alleged herein, by said William Anderson, were done on behalf of defendant United States of America, while acting within the scope of his office or employment and in the line of duty.

III

On or about January 20, 1948, said William Anderson called at the home of plaintiffs at 8312 35th Avenue S. W., Seattle, Washington, while plaintiff O. E. Hambleton was absent therefrom, contacted plaintiff Harriet Elizabeth Hambleton, in the course of and in order to further an investigation he was conducting, and did the following acts and made the following statements, unreasonably and intentionally subjecting her to the severe emotional distress which she suffered. Said William Anderson grilled plaintiff Harriet Elizabeth Hambleton for a period of about three and one-half hours on matters concerning which she had no knowledge and with which she had no

connection. He stated to plaintiff Harriet Elizabeth Hambleton, among other things, that her husband O. E. Hambleton had left her and was consorting with a redheaded woman, that her said husband was under arrest, being held on charges of grand larceny and drunken driving, and talked to her about her getting a divorce from her husband.

IV

None of the statements made by said William Anderson, as above alleged, were true. The statements made were of such a nature and the continuous grilling carried on was of such a nature, that William Anderson knew or should have known that the resulting emotional and mental distress was likely to result in illness and bodily harm to plaintiff Harriet Elizabeth Hambleton. This is particularly true in view of the fact that plaintiff Harriet Elizabeth Hambleton was at the time convalescing from a major operation and her resistance to any emotional stress was low, and William Anderson was informed of that fact and warned not to upset her.

V

As a direct and proximate result of the actions of said William Anderson as alleged herein, and of the

severe emotional distress to which he subjected her, plaintiff Harriet Elizabeth Hambleton suffered injury as follows: She suffered a complete mental collapse so that she was insane for a period of over a month; during which period she was hospitalized and under a doctor's care and underwent severe treatment, including shock treatments, for her mental disorder. The injury caused is continuing and permanent since it left said plaintiff in a condition where the said mental disorder, although now alleviated, is likely to recur. The injury and necessary treatment caused to plaintiff Harriet Elizabeth Hambleton, and is likely to further cause in the future, severe anguish, pain and suffering. Said injuries were all to her damage in the sum of Ten Thousand Dollars ($10,000.00).

VI

As a direct and proximate result of the actions of said William Anderson as alleged herein, plaintiffs have incurred a doctor bill in the amount of $270.00, hospital bills in the amount of $280.52 for plaintiff Harriet Elizabeth Hambleton, and have been damaged in those amounts.

WHEREFORE, plaintiffs pray judgment against the defendant in the amount of $10,550.52,

for costs of suit, and for a reasonable amount as attorneys fees.

STANLEY C. SODERLAND
Attorney for Plaintiffs

STATE OF WASHINGTON,
COUNTY OF KING

O. E. HAMBLETON, being first duly sworn, on oath deposes and says: that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

O. E. HAMBLETON

SUBSCRIBED AND SWORN TO before me this 30th day of April, 1948.

STANLEY C. SODERLAND,
Notary Public in and for the State of Washington, residing at Seattle.